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No. 941602

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT M. BEATTIE JR.,

Petitioner,

v.

THE BOEING COMPANY,
a Delaware Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Robert M. Beattie, Jr.,
Plaintiff-Appellant,

v.

The Boeing Company,
Defendant-Appellee.

No. 92-3314.

United States Court of Appeals,
Tenth Circuit.

Dec. 30, 1994.

James S. Phillips, Jr. of Phillips & Phillips, Wichita, KS, for plaintiff-appellant.

Timothy B. Mustaine (Mary Kathleen Babcock and Susan Lee Smith, on the brief), of Foulston & Siefkin, Wichita, KS, for defendant-appellee.

Before BRORBY, HOLLOWAY and KELLY, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff-appellant Robert A. [sic] Beattie, Jr. (Beattie) appeals from a summary judgment entered in favor of defendant-appellee The Boeing Company (Boeing) on Beattie's *Bivens* (Footnote 1)

claim for violation of his First Amendment right of free speech. (Footnote 2). The judgment followed an unpublished Memorandum and Order. We affirm.

Footnote 1. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Footnote 2. While the court also granted summary judgment on Beattie's claim for interference with prospective economic advantage under Kansas law, Beattie does not appeal this part of the court's ruling.

I

In 1984 Beattie was employed as a firefighter with the Boeing Fire Department. Appellant's Appendix (Appendix.) at 50, 175. In 1986 Boeing contracted with the United States to build two Air Force One planes for the use of

the President of the United States. *Id.* at 51. The contract there were two types of access clearance: unescorted and escorted (i.e., access in the company of a person with unescorted access clearance). Only the Air Force could grant unescorted access. However, Boeing could grant escorted access, subject to Air Force override. *Id.* at 137-139, 141, 143, 200, 205-7, 222-23, 226. Applicants for either type of access clearance were subject to a background check to determine if they satisfied the clearance criteria set forth in the contract including "unquestioned loyalty to the United States." *Id.* at 324. The criteria for both types of access were specified in the contract's Annex 2, on special security requirements. Appendix. at 263a, 324-25. Physical access to the Air Force One area was

monitored and controlled by Air Force guards, assisted by Boeing employees. *Id.* at 143-44, 279-83, 286.

The parties disagree as to whether Beattie ever had any access clearance, whether escorted or unescorted. Beattie claims that prior to February 1989 he had escorted access clearance and had entered the secured area on at least seven occasions to perform work-related duties. *Id.* at 180-91; Brief of Appellant at 5-6. (footnote 3).

Footnote 3. The testimony of two other Boeing employees corroborates Beattie's claim that he previously had access to the Air Force One area. A Boeing security guard testified that he had escorted Beattie into the restricted area on several occasions in order for Beattie to issue permits for cutting or welding on the aircraft. Appendix at 283-84, 286. Another Boeing employee testified that he [sic] had

seen Beattie in the Air Force One area between one and five times before Beattie's name was removed from the entry control list, the list of persons allowed to enter the area, by order of Boeing's security administrator. *Id.* at 320-21.

Boeing contends that "the credible uncontroverted evidence is that plaintiff did not have such access clearance and that plaintiff was never on the escorted access list." Brief of Appellee at 7. (Footnote 4).

Footnote 4. The district court apparently adopted Boeing's characterization of the evidence. In its Memorandum and Order granting summary judgment, the court stated that "[a]lthough Beattie had a general Boeing security clearance, he had not received Air Force One clearance." Brief of Appellant, App. at 4.

On February 11, 1989, Beattie requested entry to the Air Force One area in order to check certain fire valves, but his request was denied by the Air Force guard on duty. App. at 188, 255. Two days later, Beattie asked the fire chief, Roger Xanders, what the reason was for the denial. Xanders told him that Boeing's Security Administrator, James Barton, had decided to take Beattie off the Air Force One project because of his previous off-duty political activities, including certain anti-nuclear activities. *Id.* at 188-89, 191, 232-33, 254. (Footnote 5). Xanders further indicated that he had included Beattie on a list of employees for whom Xanders was seeking "optimum Presidential security clearance" but that Barton had ordered Beattie's name taken off that list because of his political

activities. *Id.* at 188-191, 232-33, 255. (Footnote 6).

Footnote 5. Beattie summarizes his past political activities as follows: My political activities have consisted of writing letters to the editor and the members of Congress, making speeches, running for the Legislature in 1988, organizing a political organization for Dukakis, organizing a group of firefighters to work for prevention of nuclear war and other mainstream activities. I have spoken out on the issues related to nuclear policies. App. at 116.

Footnote 6. In his deposition, Xanders testified that he submitted Beattie's name to Barton for approval for escorted access clearance. App. at 232. Xanders further testified that Barton instructed him to remove Beattie's name from the list because of his off-duty political activities. *Id.* at 232-235.

According to Beattie, Barton told him that he had been taken off the Air Force One project and the list of potential candidates for "optimum Presidential security clearance" because his prior anti-nuclear activities called into question his loyalty to the United States and, hence, his eligibility for access clearance under the Air Force contract. *Id.* at 115, 191, 255-56, 264; *see also Id.* at 232-33. (Footnote 7). Barton's decision to remove Beattie from the list of candidates for access clearance was neither reviewed nor confirmed by his superiors at Boeing or by the Air Force. *Id.* at 205, 210-12.

On March 3, 1989, Beattie wrote a memorandum to Xanders requesting that his name be submitted "for the Air Force clearance described to me by Mr. Barton as

'optimum Presidential security clearance.'" Appellee's Supp.App. (Supp.App.) at 91, which Beattie understood to mean escorted access clearance. App. at 114, 115. Xanders passed the request on to his superiors at Boeing, including Barton, Adolph Lomely, Jr. (Boeing's manager of program security), Natt J. Addleman (Boeing's manager for information security), and Kerry D. Crisp (Boeing's manager of security and fire protection). *Id.* at 213-14, 218; Supp.App. at 218.

In the course of an initial investigation of Beattie's background and suitability for access clearance, Barton provided Lomely with information about some of Beattie's "anti-nuclear activities," and Lomely passed the information on to Addleman. App. at 214,

334. Based on this information and a Boeing Defense Investigative Service report detailing two previously undisclosed contacts between Beattie and citizens of the Soviet Union, (Footnote 8) the Boeing managers concluded that Beattie's request for escorted access should be referred to the Air Force. *Id.* at 214-18, 221-22, 288-91.

Footnote 7. In his deposition, Barton denied that he intended to question Beattie's loyalty to the United States. Appellee's Supp.App. at 42.

Footnote 8. The report dated March 24, 1989, noted two contacts between Beattie and Soviet citizens. App. at 317. In April 1986, Beattie reportedly contacted the Soviet Embassy in Washington, D.C., to express his sympathy in connection with the death of Chernobyl firefighters. *Id.* And in March

1987, Beattie reportedly spoke with a Soviet doctor at a conference in Chicago, Illinois, about remarks made by a certain senator. *Id.* Under the Boeing Security Manual for Safeguarding Classified Information § 2.1(J), the foregoing contacts should have been reported in advance to Boeing's Security Administration, but Beattie did not report the incidents until March 24, 1989. Supp.App. at 33, 158.

Accordingly on May 10, 1989, Crisp sent a letter to the appropriate Air Force representative requesting that the Air Force decide whether Beattie's request should be approved because "unique circumstances" precluded Boeing from making a "fair and just determination." Supp.App. at 81.

> The special circumstances referred to ... concern a report to the Defense Industrial Security Clearance Office ... This report was prompted by our learning of Mr.

> Beattie's making contact with representatives from designated countries and failing to report that contact. The findings of any investigation resulting from this report could influence an access decision. We are not, however, privy to this information and therefore are unable to make an informed determination in this case.

Id.

In July 1989 the Air Force determined that "[b]ased on Mr. Beattie's past history, he is not authorized escorted or unescorted access to the [Air Force One] security area." (Footnote 9). Supp.App. at 82. Beattie remained at Boeing until June 1990 when he resigned his employment as a firefighter to attend law school. *Id.* at 7; Brief of Appellee at 15.

Beattie filed the instant suit against Boeing in 1991 alleging that his loss of access clearance had damaged his reputation, caused him to lose promotional opportunities, and led to harassment on

the job which resulted in mental distress. App. at 7-8. (Footnote 10). Following extensive discovery, Boeing filed a motion for summary judgment, arguing that (1) no *Bivens* action can be maintained against a private corporation such as Boeing, and (2) even if a *Bivens* action could in theory be asserted against Boeing, Beattie's claim against the company fails because Boeing was not engaged in federal action. App. at 65(*l*) and 65(*o*).

In granting summary judgment, the district court did not decide whether a *Bivens* claim can be asserted against a nongovernmental entity such as Boeing. Instead, the court based its ruling on its finding that Boeing had not engaged in governmental action in connection with the refusal to grant Beattie access to the Air Force One area. Specifically, the court

concluded that Boeing had not "engaged in joint activity with the Air Force" because the company "made no recommendation as to whether [Beattie's access] request should be allowed or denied"; rather, "[i]t was the Air Force which denied Beattie's request for clearance." *Id.* at 59-60 (citing and distinguishing *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1430 (10th Cir. 1984), *cert denied*, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985), and *cert. granted, decision vacated and remanded for reconsideration by City of Lawton v. Lusby*, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985)(mem.), *reaff'd on reconsideration*, 796 F.2d 1307 (10th Cir.), *cert. denied*, 479 U.S. 884, 107 S.Ct. 275, 93 L.Ed.2d 251 (1986)).

The court concluded that Boeing's affairs were not "so intertwined with

those of the government that it may be said to have acted on behalf of the government," and the government "did not 'delegate' decision-making responsibility for security to Boeing" so as to permit Boeing to exercise powers traditionally reserved exclusively to the government. App. at 59-60. Instead, the court found that the Air Force merely allowed Boeing to "take action with regard to limited security clearance," subject to Air Force override, and held that Boeing's activities did not amount to governmental action subject to constitutional scrutiny and potential *Bivens* liability. *Id.* at 60-61.

Footnote 9. In the same letter, the Air Force expressed concern that Boeing "didn't disqualify Mr. Beattie based on the report made to the Defense Investigative Service."

Supp. App. at 33, 158.

Footnote 10. Beattie previously brought a civil rights suit against the United States, seeking declaratory and injunctive relief premised on the same adverse action concerning access to the Air Force One area which is alleged in the instant case. Summary judgment was granted for the government due to lack of jurisdiction to review the security decision and lack of merit to the constitutional claims asserted. *Beattie v. United States,* 759 F.Supp. 753 (D.Kan.1991). We dismissed the appeal of that judgment because the cause had become moot due to Beattie's unilateral termination of his employment with Boeing, and we remanded the case to the district court with directions to vacate its judgment and dismiss the action for want of jurisdiction. *Beattie v. United States,* 949 F.2d 1092, 1095 (10th Cir. 1991).

II

The Availability of a *Bivens* Remedy

The threshold question in this appeal is whether we should recognize a *Bivens* action in this case. If we cannot recognize a *Bivens* action under these facts, then the district court's grant of summary judgment in favor of Boeing must be affirmed.

For reasons given below, we are convinced that there are "special factors counseling hesitation" before recognizing a *Bivens* action in these circumstances. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388, 396, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971). While defendant Boeing does not frame its appellate propositions and arguments in these terms, its brief before us does refer to the "special factors"

analysis which we feel requires our holding that we should not recognize a *Bivens* claim here. (Footnote 11). In any event, we are obliged to make this analysis because "[b]efore a *Bivens* remedy may be fashioned ... a court *must* take into account any 'special factors counseling hesitation.'" *Chappell v. Wallace,* 462 U.S. 296, 298, 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983)(emphasis added); *see also Bush v. Lucas,* 462 U.S. 367, 378, 103 S.Ct. 2404, 2411, 76 L.Ed.2d 648 (1983)(federal courts must, in making a remedial determination appropriate for a common-law tribunal, pay "particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation"). Here we find that the predominant issue of national security clearances amounts to such a

special factor counselling against recognition of a *Bivens* claim in this case.

In *Bivens*, the Supreme Court recognized that a violation of the Fourth Amendment "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389, 91 S.Ct. at 2001. The Court noted that Congress had not specifically provided for a damages remedy for Fourth Amendment violations by federal agents and that "the Fourth Amendment does not in so many words provide for its enforcement by an award of monetary damages for the consequences of its violation." *Id.* at 396, 91 S.Ct. at 2004. The Court noted, however, that "[t]he present case involves no special factors counseling hesitation

in the absence of affirmative action by Congress," *id,* and therefore held that Bivens could maintain an action for damages against the federal agents who allegedly violated his Fourth Amendment rights.

Footnote 11. In its brief before us, Boeing mentioned the "special factors" analysis while addressing its argument that Boeing did not act under color of federal law or engage in federal action:

> In [*Stevens v. Morrison-Knudsen Saudi Arabia Consortium,* 576 F.Supp. 516 (D.Md.1983), *aff'd,* 755 F.2d 375 (4th Cir. 1985)], the defendant was a private corporate employer under a substantial construction project with the United States Army Corps of Engineers. The court in *Stevens* first noted that a *Bivens* cause of action is narrow and that the United States Supreme Court has

> cautioned that even where a *Bivens* claim might otherwise lie, the remedy may be unavailable where "special factors counseling [sic] hesitation" exist. 576 F.Supp. at 520, quoting *Bivens*, 403 U.S. at 396 [91 S.Ct. at 2004].

Brief of Appellee at 22.

Moreover, Beattie treated the special factors analysis, although briefly, in his Reply Brief of Appellant at 12, stating: "There are no special considerations which should block applicability of *Bivens* and hence the *First Amendment* to this case. This Court should recognize the viability of Bivens-style actions against private corporations who act under color of federal law." Further Beattie argued that defendant Boeing omitted from its discussion of *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir.1983), the fact that the decision "did not deem defendant's private status as a special factor counselling hesitation." *Id.* at 11. Thus,

the "special factors" analysis was mentioned, although briefly, by the parties.

Bivens actions have also been recognized for violations of the equal protection component of the Fifth Amendment Due Process Clause, *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d (1979), and the Eighth Amendment Cruel and Unusual Punishment Clause, *Carlson v. Green,* 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). (Footnote 12). "In each of these cases, as in *Bivens* itself, the Court found that there were no 'special factors counseling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Schweiker v. Chilicky,* 487 U.S.

412, 421, 108 S.Ct. 2460, 2566, 101 L.Ed.2d 370 (1988). In *Chilicky* the Court stated:

> In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Id. at 423, 108 S.Ct. at 2467.

In more recent decisions, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible

for the violation." *Chilicky*, 487 U.S. 412, 421-22, 108 S.Ct. 2460, 2466-67. In each case, the Court has examined whether there is an alternative remedy or whether, even in the absence of an alternative remedy, "special factors" preclude a *Bivens* action.

Footnote 12. The Supreme Court has declined to recognize *Bivens* actions involving alleged First Amendment violations in some circumstances. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 368, 103 S.Ct. 2404, 2406, 76 L.Ed.2d 648 (1983)(refusing to allow *Bivens* action for violations of federal employee's First Amendment rights by his superiors because the employment relationship was "governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States."). However, whether a *Bivens* actions exists must be decided on a case by case basis, including

consideration of whether special factors may counsel hesitation in recognizing such a claim.

We note that we have previously recognized *Bivens* actions for violations of the First Amendment where federal employees infringe on rights of association and expression. *See Nat'l Commodity and Barter Ass'n v. Gibbs,* 886 F.2d 1240, 1248 (10th Cir. 1989)(per curiam); *Nat'l Commodity and Barter Ass'n v. Archer,* 31 F.3d 1521, 1529-31 (10th Cir. 1994); *accord Dellums v. Powell,* 566 F.2d 167, 195-96 (D.C.Cir.1977), *cert. denied,* 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); *Gibson v. United States,* 781 f.2d 1334, 1342 (9th Cir. 1986), *cert denied,* 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987).

In *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), the Court unanimously refused "to create a *Bivens* action for enlisted military

personnel who alleged that they had been injured by the unconstitutional actions of their superior officers," *Chilicky*, 487 U.S. at 422, 108 S.Ct. at 2467, despite the fact that the personnel had no remedy against the government. The Court noted that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 U.S. at 304, 103 S.Ct. at 2367.

In *United States v. Stanley*, 483 U.S. 669, 681, 107 S.Ct. 3054, 3062, 97 L.Ed.2d 550 (1987), the Court stated the general proposition that *Bivens* actions should never be allowed for military personnel where the alleged "injury arises

out of activity 'incident to service.'" (Footnote 13). The "special factor" counselling hesitation was "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.* at 683, 107 S.Ct. at 3063. Thus, "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" *Id.* at 684, 107 S.Ct. at 3064 (citation omitted).

Footnote 13. *Stanley* arose out of the Army's program of secret testing of the drug lysergic acid diethylamide (LSD). Stanley was a master sergeant at Fort Knox who had volunteered in 1958 to test the effectiveness of protective clothing and equipment as defenses against chemical warfare. Instead, he was secretly administered doses of LSD four times in a month. He suffered hallucinations, periods of

incoherence and memory loss, among other adverse effects. It was not until late 1975 that he learned he had been given LSD. *See Stanley*, 483 U.S. at 671-72, 107 S.Ct. at 3057-58.

The Supreme Court has not specifically addressed whether the denial of a security clearance can be grounds for a *Bivens* action. However, in *Dep't of Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), the Court considered "whether the Merit Systems Protection Board (Board) has authority to review the substance of an underlying decision to revoke a security clearance in the course of reviewing an adverse action." *Id.* at 520, 108 S.Ct. at 820. In concluding that it did not, the Court noted that "the grant of security clearance to a particular employee, a sensitive and inherently discretionary

judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527, 108 S.Ct. at 824. The Court emphasized:

> The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.
>
> ....
>
> It should be obvious that no one has a "right" to a security clearance. The grant of a security clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interest of the national security." [citations omitted].
>
> Predictive judgments of this kind must be made by those with the necessary expertise in protecting

> classified information. For "reasons ... too obvious to call for enlarged discussion," [citation omitted], the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing potential risk.... Thus, unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. [citations omitted].

Id. at 527-530, 108 S.Ct. at 824-825.

Egan thus stands for the proposition that decisions regarding the grant or denial of a security clearance are the province of the Executive Branch. Although *Egan* addressed only the authority of the Merit Systems Protection Board to

review such decisions, we believe that the reasoning extends to review by the courts. *See Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411-13 (10th Cir.), *cert. denied*, 488 U.S. 825, 109 S.Ct. 73, 102 L.Ed.2d 49 (1988). Like the Board, we are an "outside nonexpert body" unqualified to second-guess the judgment of the President, acting through his officials in the Executive Branch, on whether to grant or deny a security clearance. As we said in *Hill*:

> The Executive Branch has constitutional responsibility to classify and control access to information bearing on national security. A security clearance is merely temporary permission by the Executive for access to national secrets. It flows from a discretionary exercise of judgment by the Executive as to the suitability of the recipient for such access, consistent with the interests of national security.

Id.

In *Hill*, the district judge had granted a preliminary injunction requiring the Air Force to reinstate the plaintiff's security clearance. 844 F.2d at 1408. The district judge found that the Air Force's action in suspending the plaintiff's clearance had deprived plaintiff of his Fifth Amendment rights to equal protection and due process. On appeal, we applied the rationale of *Egan* and held that the district court had no authority to review the Air Force's suspension of Hill's security clearance:

> [*Egan*] removes any doubt regarding the authority of federal courts to review the merits of the grant or denial of security clearances. Under any circumstances which might be germane to this case there is no such authority. As is indicated by the Supreme Court's statement of the question in that case, *Egan* extends to the merits of suspension, modification, or revocation of a previously granted security clearance, since the underlying rationale applies with equal logic to

> revocation as it does to an initial grant of authority. These matters are a "sensitive and inherently discretionary judgment call ... committed by law to the appropriate agency of the Executive Branch."

Id. at 1409 (citation omitted). *See also Dorfmont v. Brown,* 913 F.2d 1399, 1401 (9th Cir.1990) ('[w]e have no more business reviewing the merits of a decision to grant or revoke a security clearance than does the [Merit Systems Protection Board]. Thus, the reasoning behind *Egan* precludes this type of judicial review."), *cert. denied,* 499 U.S. 905, 111 S.Ct. 1104, 113 L.Ed.2d 214 (1991). We believe the reasoning of *Egan* and *Hill* applies to this case as well.

In a prior lawsuit arising out of the same underlying facts, Beattie sued the United States alleging, as he has here, that denying his access to the Air Force One area violated his constitutional

rights. *Beattie v. United States,* 759 F.Supp. 753 (D.Kan.1991)(*Beattie I*), *vacated as moot,* 949 F.2d 1092 (10th Cir.1991). The district court in *Beattie I* granted the government's motion for summary judgment, stating:

> The decision whether to allow access to the Air Force One area is the same type and quality and requires the same predictive judgment as the decision whether to grant a security clearance. The only distinction appears to be one of degree. An employee with secret security clearance is not necessarily allowed escorted or unescorted access to the Air Force One area. *This court concludes it cannot judicially review the merits of the Air Force's decision to deny the plaintiff access to this secured area. This court is in no position to second-guess that decision.*

759 F.Supp. at 759 (emphasis added)(citation omitted). Addressing Beattie's claim that his First Amendment right to free speech was violated, the court concluded:

> this court is not willing to compromise national security and substitute its decision for that of the Air Force on what is a security risk. To deny access on the basis of plaintiff's contacts with Soviet citizens is not so unreasonable or untenable as to justify a closer scrutiny, or judicial investigation of sorts, into the Air Force's reasoning.

Id. 762. We agree with this sound reasoning and decide the current lawsuit on the same grounds.

To be sure, the case before us involves a private party rather than a government agency. However, Boeing's limited authority to grant or deny escorted access clearance derived solely from its contract with the Air Force. App. at 137-41, 205-07, 222-23, 226. (Footnote 14). Boeing's authority was thus delegated to it by the Air Force, and hence by the Executive Branch. We see no compelling reason to treat the security

clearance decision by Boeing differently than the similar decision made by the Air Force. Both decisions represent the exercise of authority delegated by the Executive Branch and are entitled to appropriate deference by the federal courts. *See Beattie I,* 759 F.Supp. at 759. Therefore, we conclude that we may not review Boeing's action or that of the Air Force in denying Beattie access to the Air Force One area. (Footnote 15).

Footnote 14. According to deposition testimony, in making decisions regarding security clearance Boeing was required to apply the standards set forth in the contract, including ascertaining whether an applicant possessed "unquestioned loyalty to the United States." App. at 137-41, 205-07, 222-23, 226; Supp.App. at 118.

Footnote 15. At this time, we need not

resolve whether such denials are unreviewable under all circumstances. *See Jamil v. Sec'y, Dep't of Defense,* 910 F.2d 1203, 1207 (4th Cir. 1990)("we need not and do not reach the question of whether *Egan* precludes courts from reviewing security clearance decisions for pretext in the context of ... a Title VII claim of discrimination.")

Beattie alleges that the denial of access violated his First Amendment rights. To consider this claim would necessarily require us to review the merits of the decisions to deny access to the Air Force One area. This we cannot do. The unreviewability of the security clearance decision is a "special factor counselling hesitation," which precludes our recognizing a *Bivens* claim in this case.

AFFIRMED.

In The United States District Court

For the District of Kansas

ROBERT M. BEATTIE, JR.,

Plaintiff,

vs.

THE BOEING COMPANY,

Defendant.

No. 91-1050-K

MEMORANDUM AND ORDER

August 10, 1992

PATRICK F. KELLY, Chief Judge.

Robert Beattie joined the Boeing Fire Department on October 1, 1984. As a firefighter at Boeing, Beattie was a member of the International Union, United Plant Guard Workers of America. The terms and conditions of Beattie's employment were defined by a collective bargaining agreement between Boeing and the union.

The agreement includes a provision imposing mandatory grievance procedures.

In addition, the collective bargaining agreement required Beattie to maintain a governmental security clearance. The security clearance requirement includes provisions contained in Boeing's Security Manual for Safeguarding Classified Information. Section 2.1(J) of the manual requires that personnel with clearances must report to security administrators 30 days before attending "a meeting where representatives of Designated Countries may be in attendance." The manual also requires that persons with security clearances must report in writing the nature of their contacts with the agents of "Designated Countries." The manual expressly includes the former USSR in its list of designated

countries.

In 1986, Beattie telephoned the Soviet Embassy to express his condolence to the families of Soviet firefighters killed at Chernobyl. In 1987, Beattie attended a national convention of the Physicians for Social Responsibility. At this convention, he spoke with one Dr. Okdem Keshaashivili, a Soviet physician and representative of a Soviet anti-nuclear organization. Beattie made another telephone call to the Soviet Embassy at about the same time.

Beattie mentioned these contacts to other persons at the Boeing Fire Department. However, it is uncontroverted that Beattie filed no written report of his telephone contacts, nor did he file a report prior to attending the conference

where he spoke with Dr. Keshasshvili.[1]

Beattie was the subject of a 1988 investigation by the Defense Investigative Service (DIS). The DIS investigation occurred without the knowledge of Boeing. DIS took no adverse action against Boeing as a result of its investigation.

In 1986, Boeing entered into a contract with the United States Air Force under which it would produce two airplanes to replace the current Air Force One. Under the contract, the area in which Boeing would construct the designated airplanes was a secured area. In order to enter the area, Boeing employees had to obtain formal access clearance. Access

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1. Beattie was also engaged in domestic activities relating to nuclear war, to which he was opposed. On September 20, 1986, an article mentioning Beattie's participation in various disarmament organizations was published in the local newspaper.

clearance might take the form of either escorted access or unescorted access.[2]

Each department manager at Boeing (including Roger Xanders, Chief of the Boeing Fire Department) was allowed a given number of security clearances which they might allocate.[3] The decision of a manager to deny a request for clearance was not reviewable by higher level management; it was a matter left to the discretion of the department manager. When the manager did agree to process an individual's request for clearance, the

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2. This access clearance is separate and distinct from the general security clearance maintained by Beattie as a member of the Boeing Fire Department. An individual might be denied access clearance without any negative effect on his general security clearance.

3. Xanders has testified that although the size of his clearance allotment might vary over time, he was generally "only allotted so man," or was give "X amount of folks" for who clearances might be obtained.

request was forwarded by the manager to James Barton, Air Force One Program Security Administrator.

No person had a right to work in the Air Force One area. Under contract between the Air Force and Boeing, a background investigation was required of each person seeking access to the Air Force One area. As program security administrator, Barton had discretion to deny or revoke requests for escorted access to the Air Force One area. If the case was questionable, Barton referred the matter to his superiors at Boeing, Adolph Lomely (Manager of Program Security), and Nathaniel Addleman (Manager of Information Security and Fire Protection Engineering).

However, independent of the decisions made by Boeing security personnel as to requests for escorted access, the Air

Force retained the final power to determine whether a given person should or should not have access. The Air Force possessed the authority to completely exclude any individual from access to the Air Force One area. The criteria by which persons might be granted escorted access into the Air Force One area were specified by the Air Force, not Boeing. Finally, only the Air Force could extend unescorted access to the Air Force One area.

Beattie told Xanders that he wished to be considered for access clearance to the Air Force One area. Although Beattie had a general Boeing security clearance, he had not received Air Force One access clearance. Xanders promised to check with Barton about access clearance for Beattie.

In late 1988 or early 1989, Xanders spoke with Barton. Barton expressed

concern to Xanders about Beattie's Soviet contacts, and stated that to process the request would present the risk that Beattie might lose his security clearance because of the resulting government investigation. However, if a request was submitted, Barton indicated he would not refuse it, but would treat the request like that of any other person.

On February 13, 1989, Beattie asked Xanders about the status of his access request. Xanders told Beattie that he had not formally forwarded a request for access clearance, since the fire department's allotment of access clearances had been filed and since Beattie was not needed in the Air Force One area. He also related the concern that had been expressed by Barton--that pursuing the matter might result in the

loss of Barton's [sic] security clearance after a government investigation. If Beattie had any questions, Xanders said, he should speak with Barton.

Later that month, Beattie met with Barton. Barton told Beattie that he thought Beattie's chances for obtaining clearance were very poor under the circumstances.

After this meeting, Beattie filed a position statement stating that he had been taken off the Air Force One project "solely because of my political activities." However, Beattie filed no formal grievance over the matter. The president of his union local told him that he did not believe the matter should be grieved. Beattie signed an agreement holding the union harmless if, as a result of further actions on his part, he lost

his security clearance.

On March 3, 1989, Beattie requested through Xanders that Boeing submit his name for an Air Force One clearance from the government. In his request, Beattie asked for "optimum Presidential security clearance."[4] At that time, no member of the Boeing Fire Department had unescorted access, and only a minority of the firefighters had escorted access, to the Air Force One area.

Chief Xanders submitted the request to Barton on March 9.[5] Barton prepared a

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4. "Optimum" is defined as "most favorable or most conducive to a given end esp[ecially] under fixed conditions." Webster's Third International Dictionary, (3rd ed.). In his response to Boeing's motion for summary judgment, Beattie contends that he only meant to apply for escorted access. Whatever Beattie may have subjectively intended, the request itself reflects an intention to obtain the greatest possible level of clearance.

5. Beattie contends that as a result of this request, Barton instructed Xanders to "take his [Beattie's] name off the list" of persons with escorted access. This is a misrepresentation of

file on the subject which he passed on to his superiors, Lomely and Addleman. The clearance request was then considered by Lomely and Addleman along with Kerry Crisp, the head of security at Boeing.

In reviewing the request, the three security administrators learned of Beattie's Soviet contacts and the failure to file the required written reports. In addition, Boeing by this time had also learned of the 1988 DIS investigation. The results of that investigation remained unknown to Boeing. Lomely, Addleman and Crisp concluded that the matter was a "grey area" which should not be decided by Boeing, and that the extent of access, if any, was a matter which should be

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the cited portion of Xander's testimony. The uncontradicted facts establish that Beattie was never on this list of persons with access (escorted or unescorted) to the Air Force One area.

determined solely by the Air Force. This decision was based on their determination that the Air Force was the more appropriate entity to decide such matters, coupled with the belief that the Air Force was likely to be aware of the results of the DIS investigation.

On May 10, 1988, Crisp forwarded Beattie's request to Captain Barry Graham of the Air Force. Having learned of both Beattie's Soviet contacts and his reporting failures, Lomely, Addleman and Crisp were required by the security manual to convey this information to the government. Accordingly, an adverse information report was filed with the DIS.

On July 27, 1989, the Air Force decided that Beattie should have neither escorted nor unescorted access to the Air Force One area.

Beattie continued to work at Boeing until June, 1990, when he voluntarily left work to attend law school. Until his resignation, he retained his general security clearance and remained fully eligible to serve as a member of the Boeing Fire Department. The denial of Air Force One access clearance did not affect Beattie's job rating, hours, salary, or eligibility for raises.

Beattie contends that because he was denied access to the Air Force One area, he lost the opportunity to obtain a promotion to lieutenant in the Boeing Fire Department. Beattie has offered no credible evidence that Air Force One access was a requirement for advancement to the position of lieutenant. In addition to his own conclusory allegations, not based on personal

knowledge, that he was denied the position because his request for access had been denied, Beattie simply cites the testimony of two fire department lieutenants.

This testimony indicates at most that these individuals "occasionally" enter the Air Force One area. The testimony does not indicate that such entry (access clearance) is in itself a requirement for advancement to the position of lieutenant. On the other hand, there is uncontroverted testimony by Chief Xanders that Air Force One area access was not a prerequisite for advancement to the position of lieutenant.

Beattie has alleged a Bivens-type claim, contending that Boeing violated his First Amendment rights. Second, he contends that Boeing committed the tort of interfered-with prospective advantage. Boeing has now moved for summary judgment

on both claims advanced by Beattie. Oral argument relating to this motion was presented to the court in a hearing held July 15, 1992.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. Ellis v. El Paso Natural Gas Co.,

754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. Dayton Hudson Corp. v. Macerich Real Estate Co., 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more

than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(quoting Fed.R.Civ.P. 56(e))(emphasis in Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

1. Bivens Claim and Governmental Action

In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court held that a cause of action existed for persons suffering violations of their constitutional rights arising from the actions of federal agents under color of authority. The courts have generally demurred from deciding whether this cause of action may also be brought against private parties. However, even assuming a Bivens action is available against a private actor, the facts of the present case establish that at the time of the alleged constitutional deprivation, Boeing was not engaged in governmental action.

The courts have evolved three tests to determine the existence of governmental action by private persons. First, under the joint action or symbiosis test,

governmental action may be found where the private party is a willful participant in joint action with the government or its agents. Second, under the nexus test, governmental action may be found where the affairs of the private party are so intertwined with those of the government that it may be said to have acted on behalf of the government. Finally, under the public function test, governmental actions exists when a private party exercises powers traditionally reserved to the government exclusively. See, e.g., Howerton v. Gabica, 708 f.2d 380, 383 (9th Cir. 1987)(security agents of private firm conducting search of offices of Navy officer at Navy Industrial Reserve Plant engaged in governmental activity); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1430 (10th Cir. 1984), cert. denied, 474

U.S. 818 (1985)(store security guard allowed by local police "to substitute his judgment for that of the police" was engaged in governmental action); Thorne v. City of El Segundo, 726 F.2d 459, 471 n.11 (9th Cir. 1983)(private person administering polygraph exam on behalf of, and paid by, the police was engaged in governmental action); Goichman v. Rheuban Motors, 682 F.2d 1320 (9th Cir. 1982)(private towing company, acting at direction of local police and pursuant to a statutory scheme designed to accomplish the state's enforcement of its traffic laws, performing public function); Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1226 (5th Cir. 1982)(firm, which had contracted with the government to provide a surveillance system in the Sinai peninsula and to which the government had delegated

"a broad governmental role including a peacekeeping role," engaged in governmental action by conducting searches of its employees). Cf. Morast v. Lance, 807 F.2d 926 (11th Cir. 1987)(national bank which fired its executive vice-president was not engaged in governmental action, despite federal regulation of national banks).

Application of each of these tests fails to demonstrate the existence of governmental action by Boeing. It is important to note that the Air Force did not "delegate" decision-making responsibility for security to Boeing. The Air Force allowed Boeing to take action with regard to limited security clearance. However, the Air Force expressly retained the right to determine requests for unescorted access to the Air

Force One construction project.

Nor, in the events which led to Beattie's asserted injury, was Boeing engaged in joint activity with the Air Force. Boeing passed on to the Air Force Beattie's request for "optimum" presidential security clearance and information of Beattie's security background. Boeing made no recommendation as to whether the request should be allowed or denied. It was the Air Force which denied Beattie's request for clearance.

2. State Tort Claim

Beattie has also asserted a state tort claim against Boeing for interference with prospective advantage. This claim, however, is preempted by § 301 of the Labor Management Relations Act. Since the claim of tortious interference with

prospective advantage requires a review of Beattie's right to promotion under the bargaining agreement, and therefore an interpretation of the agreement itself, the present claim is preempted by federal law and instead should have been submitted for the appropriate grievance resolution procedures. See Lingle v. Norge Division of Magic Chef, 486 U.S. 399 (1988).

Moreover, even without the application of federal preemption, it is apparent that Beattie's tort claim must fail under Kansas law. The tort of interference with prospective advantage, itself, presupposes some action by a third person which as altered the relationship between the plaintiff and the party which would otherwise have extended the advantage. Here, however, the claim is essentially that Boeing interfered with

itself. The plaintiff has offered no authority for this remarkable expansion of law relating to tortious interference.

Moreover, under the law of Kansas, an employer is privileged to convey information relating to the work history of a former employee to a prospective employer. In any claim by the employee for tortious interference with prospective advantage, the employee must prove that his former employer was acting with actual malice. Turner v. Halliburon, Inc., 240 Kan. 1, 722 P.2d 1106 (1986). The court finds that the public policy concerns which led the Kansas Supreme Court to adopt this privilege in Turner would also lead it to find a similar need for protection for an employer that conveys information regarding an employee to the federal government for purposes of

national security. Since there is no evidence of actual malice in the present case, that is, that Boeing knew, or should have known, the information it conveyed to the Air Force was wrong or reckless, Beattie's tort claim cannot stand.

IT IS ACCORDINGLY ORDERED this 10 day of August, 1992, that defendant Boeing's motion for summary judgment (Dkt. No. 48) is hereby granted.

S/

PATRICK F. KELLY, CHIEF JUDGE

Robert M. Beattie, Jr.,

Plaintiff-Appellant,

v.

United States of America,
Department of Defense of
the United States, Defense
Investigative Service,

Defendants-Appellees.

No. 91-3139.

United States Court of Appeals,

Tenth Circuit.

Nov. 26, 1991.

James S. Phillips, Jr. of Phillips & Phillips, Chartered, Wichita, Kan., for plaintiff-appellant.

Lee Thompson, U.S. Atty., Stephen K. Lester, Asst. U.S. Atty., Wichita, Kan., for defendants-appellees.

Before ANDERSON, BARRETT, and BRORBY, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

Plaintiff Robert M. Beattie, a former

fire fighter at the Boeing Military Airplane Company (BMAC), brought this civil rights action for declaratory and injunctive relief to redress various constitutional violations alleged in connection with a decision of the Defendant United States Air Force (USAF) denying him access, for security reasons, to the Air Force One project area at his BMAC plant. The government filed a motion for dismissal on mootness grounds and a motion for summary judgment on the merits. The district court granted the latter motion in a published opinion, *see Beattie v. United States*, 759 F.Supp. 753 (D.Kan.1991), and this appeal followed.[1]

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1. After examining the briefs and appellate record, this panel has

We shall recount only those facts and allegations pertinent to our disposition of this appeal. A full account of the background of the case may be found in the district court's opinion. At the commencement of this action, Plaintiff retained his position with BMAC, but his promotional opportunities were allegedly impeded by his inability to enter the Air Force One area. In his Second Amended Complaint and the Pretrial Conference Order, Plaintiff also alleged damage to his reputation by the defamatory impression created by the Air Force One

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determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

access denial, as well as unspecified harassment on the job by other BMAC employees. Plaintiff sought various forms of equitable relief to undo the USAF's decision and remedy the injury it allegedly caused. During the course of this litigation, however, Plaintiff unilaterally terminated his employment with BMAC, prompting the government's motion to dismiss the action as moot. The district court summarily denied the motion at the outset of its opinion, stating that it would, rather, "proceed to the motion for summary judgment as the defendant's cursory arguments for mootness appear flawed." *Beattie*, 759 F.Supp. at 755.

The mootness question necessarily constitutes our threshold

inquiry, because the existence of a live case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S.Ct. 1249, 1253, 108 L.ED.2d 400 (1990). Since this requirement "subsists through all stages of federal judicial proceedings, ... it [is] not enough that a dispute was very much alive when suit was filed.... The parties must continue to have a '"personal stake in the outcome"' of the lawsuit." *Id.* 110 S.Ct. at 1253-54 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962))). We must therefore

determine whether Plaintiff's termination of his employment relationship with BMAC, within which the challenged USAF ruling had its only direct application, has mooted the parties' admittedly once-live controversy.

It is significant that Plaintiff's claims are limited to equitable relief, because "while a plaintiff who has been constitutionally injured can bring a[n] ... action to recover damages, that same plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Facio v. Jones*, 939 F.2d 541, 544 (10th Cir.1991); *see, e.g., Melvin v. Nickolopoulos*, 864 F.2d 301, 304 (3rd Cir.1988) (receipt of

requested parole deprivation hearing mooted claim for injunctive relief but not damages); *Francis v. Fox*, 838 F.2d 1147, 1149 and n. 6 (11th Cir. 1988) (claim for unconstitutional denial of work release not mooted by subsequent parole because damages sought in addition to declaratory and injunctive relief). We continue to heed the Supreme Court's pertinent admonition, in *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S.Ct. 669, 675-76, 38 L.Ed.2d 674 (1974), that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *See, e.g., Facio*, 929 F.2d at 545; *Feit v. Ward*, 886 F.2d 848, 857 (7th Cir. 1989).

Likewise, with respect to declaratory relief, "we look beyond the initial 'controversy' which may have existed at one time [and] ... decide 'whether the facts alleged ... show that there is a substantial controversy ... of sufficient *immediacy and reality* to warrant the issuance of a declaratory judgment." *Schepp v. Fremont County,* 900 F.2d 1448, 1452 (10th Cir.1990) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)) (emphasis added in *Schepp*).

The only immediate and direct adverse effects of the challenged USAF decision related to the conditions of Plaintiff's employment at the BMAC plant where the Air

Force One project was located. Under the principles recited above, Plaintiff's termination of his employment at BMAC clearly mooted any claims for relief in this regard. *See, e.g., Hampton v. IRS*, 913 F.2d 180, 182 (5th Cir. 1990) (claims for equitable redress of discrimination regarding conditions of employment mooted by plaintiff's subsequent unchallenged discharge); *Feit*, 886 F.2d at 857-58 (equitable First Amendment challenge to forest service policy prohibiting political protest by employees mooted by plaintiff's termination from forest service); *Sandidge v. Washington*, 813 F.2d 1025, 1025-26 (9th Cir.1987) (equitable First Amendment challenge to unfavorable job performance evaluation mooted by

plaintiff's discharge); *Back v. Baptist Medical Ctr.*, 671 F.2d 1100, 1102-03 (8th Cir.1982) (plaintiff mooted equitable claims regarding alleged sex discrimination when he "voluntarily removed himself from the impact of the challenged practice by discontinuing his employment [and] abandoning his claim for damages"). Again, the absence of any claim for compensatory relief is critical to our mootness analysis here.[2] *Cf. Bunch*

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2. We also note that the "capable of repetition, yet evading review" exception to madness has no application here, as this particular controversy is neither likely to recur nor, by nature, so ephemeral as to elude the processes of judicial review. *See, e.g., Feit,* 886 F.2d at 858 n. 12 and accompanying text; *Backus,* 671 F.2d at 1103. *See generally Johansen v. City of Bartlesville,* 862 F.2d 1423, 1426 (10th Cir.1988) (outside of class action context, exception is limited

v. Bullard, 795 F.2d 384, 389 (5th Cir.1986) (Title VII claim for denial of promotion not mooted by plaintiff's resignation because compensatory back-pay still available); *Aiello v. City of Wilmington*, 623 F.2d 845, 850 n. 8 (3d Cir.1980) (challenge to Fire Bureau regulations, pursuant to which plaintiff had been disciplined, not mooted by plaintiff's retirement because compensatory damages sought).

Furthermore, Plaintiff's conclusory allegations of continuing

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to cases where "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again'" (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975)).

injury and collateral consequences are not sufficient to keep this case alive. Plaintiff asserted below that the challenged USAF decision (1) ultimately resulted in "Plaintiff's resignation from Boeing, which may be deemed a constructive discharge," Plaintiff's Response in Opposition to Defendant's Motion to Dismiss at 13 (Appellant's App. at 141); (2) damaged his reputation by creating a "defamatory impression," Pretrial Conference Order at 4 (Appellant's App. at 17); *see also* Second Amended Complaint at 5, 8 (Appellant's App. at 5, 8); and (3) "impaired his employment prospects," *id.* Plaintiff did not even plead a constructive discharge theory or include one in the Pretrial Order, much less

substantiate such a claim on the record before us. As for injury to reputation, the following passage from the district court's opinion, though addressed directly to the related but separate question whether the USAF decision deprived Plaintiff of a liberty interest, also explains why that decision cannot be deemed defamatory:

> "A [security] clearance does not equate with passing judgment upon an individual's character." [*Department of the Navy* v.] *Egan*, 484 U.S. [518,] 528, 108 S.Ct. [818,] 824 [98 L.Ed.2d 918] [(1988)]. The Air Force informed BMAC that it was denying plaintiff access because of his "past history," in particular, his Soviet

> contacts that were the subject of the [Defense Investigative Service] report. These are no specific reasons which fall within the Supreme Court's rationale in *Egan*. Because clearance may be denied for reasons ranging from past conduct to familial ties with a hostile country, the mere act of denying clearance does not imply "disloyalty or any other repugnant characteristic." 484 U.S. at 528-29, 108 S.Ct. at 824-25.

Beattie, 759 F.Supp. at 761. This analysis is entirely consistent with our discussion of a similar matter in *Hill v. Department of Air Force*, 844 F.2d 1407, 1409, 1412 (10th Cir.) (quoting and interpreting same statements from *Egan*),

cert. denied, 488 U.S. 825, 109 S.Ct. 73, 102 L.Ed.2d 49 (1988). *See also Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203, 1209 (4th Cir.1990) (revocation of security clearance "does not constitute ad adjudication of one's character"). Finally, Plaintiff's unsubstantiated allegations regarding the unspecified impairment of unidentified employment prospects are simply too speculative to support the exercise of federal jurisdiction.[3] *See Feit*, 886 F.2d at 857-

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3. We emphasize the quite limited character of the USAF decision in this case. The USAF determined only that Plaintiff should not be permitted access to BMAC's Air Force One project area. It did not generally revoke Plaintiff's security clearance, which could conceivably have had a more objectively demonstrable effect on specifiable employment opportunities with other firms

58; *Sandidge*, 813 F.2d at 1025-26; *see also Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir.1987) (possibility that plaintiff might be disqualified from potential future employment if challenged suspension

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requiring such clearances as a condition of hire. We do not mean to suggest, however, that demonstration of such adverse consequences would have any significance beyond the threshold question of mootness. As the district court's opinion aptly reflects, pertinent case law would present Plaintiff a virtually insurmountable task on the merits. *See Hill*, 844 F.2d at 1409, 1411-13 (*Egan* removes any doubt regarding federal courts' lack of authority to review substance of security clearance decisions, and plaintiff's constitutional allegations advanced in connection therewith provided no independent basis permitting federal courts to pass on merits of such decisions); *see also Dorfmont v. Brown*, 913 F.2d 1399, 1401-04 (9th Cir.1990), *cert. denied*,— U.S.—, 111 S.Ct. 1104, 113 L.Ed.2d 214 (1991); *Jamil*, 910 F.2d at 1205-06, 1209; *Williams v. Reilly*, 743 F.Supp. 168, 171-72 (S.D.N.Y.1990).

of her commercial pilot certificate were disclosed held too speculative to create a cognizable interest in outcome of litigation sufficient to support federal jurisdiction); *cf. Phelps v. Wichita Eagle-Beacon,* 886 F.2d 1262, 1268-69 (10th Cir.1989) (allegations that defendants placed "defamatory cloud" over plaintiff's "employment opportunities," without evidence of present harm to established business relationships, deemed mere "speculative future harm" too intangible to implicate liberty or property interest).

For the reasons expressed above, we conclude that this case has become moot. Accordingly, this appeal is DISMISSED, and the cause is REMANDED to the United States

District Court for the District of Kansas with directions to vacate its judgment and dismiss the action for want of jurisdiction. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950).

Robert M. Beattie, Jr.,

Plaintiff,

v.

United States of America,

Defendant.

No. 89-1526-C

United States District Court,

D. Kansas.

March 15, 1991.

James S. Phillips, Jr., Phillips & Phillips, Wichita, Kan., for plaintiff.

Stephen K. Lester, Asst. U.S. Atty., Wichita, Kan., for defendant.

MEMORANDUM AND ORDER

CROW, District Judge.

This case comes before the court on the defendant's motion for summary judgment (Dk. 22) and motion to dismiss

(Dk. 48). Plaintiff brings this civil rights action alleging certain of his constitutional rights were violated when he was denied access to the Air Force One project area. Defendant argues in support of summary judgment that the plaintiff either was without constitutional rights or was not denied them. Defendant also seeks to dismiss the plaintiff's suit for mootness as the plaintiff quit his employment as a fire fighter at Boeing Military Airplane Company (BMAC). The court will proceed to the motion for summary judgment as the defendant's cursory arguments for mootness appear flawed.

A motion for summary judgment gives the judge an initial opportunity to assess

the need for a trial. Without weighing the evidence or determining credibility, the court grants summary judgement when no genuine issue of material fact exists and judgment can be entered for the movant as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511,91 L.Ed.2d 202 (1986). The basic inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252, 106 S.Ct. at 2512.

An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for

the nonmoving party. *Id.* at 248, 106 S.Ct. at 2510. An issue of fact is "material" if proof of it might affect the outcome of the lawsuit. 477 U.S. at 249, 106 S.Ct. at 2510. Factual inferences are drawn to favor the existence of triable issues, and where reasonable minds could ultimately reach different conclusions, summary judgment is inappropriate. See *Riley v. Brown & Root, Inc.*, 896 F.2d 474 476-77 (10th Cir. 1990).

The movant's initial burden under Fed.R.Civ.P. 56 is to show the absence of evidence to support the nonmoving party's case. *Windon Third Oil and Gas v. Federal Deposit Ins.*. 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). The

movant must specify those portions of "'the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any,'" which demonstrate the absence of a genuine issue of fact. *Windon,* 805 F.2d at 345 (quoting Fed.R.Civ.P.56(c)). It may be sufficient for the movant to establish that the alleged factual issues are without legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir.1987).

The opposing party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts supported by the kinds of evidentiary materials listed in Rule 56(c). *Anderson,* 477 U.S. at 250, 106

S.Ct. at 2511. The evidence is deemed true and all reasonable inferences are drawn in his favor. *Windon,* 805 F.2d at 346. More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed.R.Civ.P. 1." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Rule 56 does not bar a court from entertaining motions for summary judgment before discovery is completed. *Weir v. Anaconda Co.,* 773 F.2d 1073, 1081 (10th Cir. 1985). Under Rule 56(f), a litigant may file an "affidavit explaining why he or she cannot present facts to oppose the

motion." *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1376 (10th Cir.1988). An affidavit is not sufficient unless the affiant shows how a continuance would provide the facts necessary to create genuine issues of material fact. *Weir*, 773 F.2d at 1083. Plaintiff originally responded that discovery was incomplete. The attached affidavit did not explain why the additional discovery would be important to any of the pending motions. Plaintiff has filed a supplemental brief (Dk. 60) referring to some of this additional discovery without renewing his argument for more discovery. The court is satisfied that the defendant's motion for summary judgment is ripe for decision.

For purposes of this motion, the court finds the following facts to be uncontroverted:

1. In 1986, Boeing Military Airplane (BMAC) entered into a contract with the United States Air Force to build two aircraft to replace the President's existing aircraft known as Air Force One.

2. Entrance to the building area of these two aircraft is controlled and supervised. Unescorted permission to enter is granted by the Air Force, and escorted permission is granted by Boeing.

3. Plaintiff, Robert M. Beattie, was employed by BMAC as a fire fighter. Plaintiff worked there from 1984 until June of 1990 when he resigned. On different occasions, plaintiff entered the

Air Force One area to care for injured workers and issue permits for certain potentially hazardous work.

4. In February of 1989, plaintiff attempted to enter the Air Force One area to check the fire valves but was told that his name was not on the list of authorized persons. When asked by plaintiff, his superiors at BMAC explained that a criteria for access to the area was "unquestioned loyalty to the United States" and that his name was removed because of his political activities.

5. Plaintiff then filed a grievance against BMAC based on these events. On March 3, 1989, plaintiff and BMAC settled the grievance agreeing that BMAC would request the Air Force to determine whether

plaintiff would be allowed access to the area. Plaintiff executed the following document on the same day:

> I, Robert M. Beattie, acknowledge the possibility exist [sic] that through my efforts to obtain an Air Force One clearance, that questions could arise from the Government's investigation jeopardizing my ability to retain a secret clearance. I further understand that a secret clearance is required by contract with Boeing Military Airplanes and United Plant Guard Workers of America, Local 255 to maintain employment as a member of the Boeing Fire Department.
>
> With these things in mind, I hereby request that the Company submit my

name to be processed for an Air Force One clearance. In doing this I am accepting full responsibility of the outcome and do release the International Union United Plant Guard Workers of America (UPGWA) and specifically Local 255, Wichita, Kansas of any liability in the event that should occur.

6. Kerry Crisp, manager of security and fire protection at BMAC, wrote Capt. Barry Graham at the Wright-Patterson Air Force Base in Ohio. Mr. Crisp acknowledged that BMAC had adjudicated escorted entries in the past according to the terms of the contract and security administration requirements, but he believed that the instant matter had

unique circumstances and that the Air Force was better suited to make an informed determination. Mr. Crisp set forth the circumstances in the letter as follows:

> This case concerns a Mr. Robert M. Beattie Jr. He is a Boeing Military Airplanes Fireman and his job includes facilities fire inspections and special welding permits which would require his periodic entry into the AF-1 Area. *The special circumstances referred to in paragraph 1 of this letter concern a report to the Defense Industrial Security Clearance Office in accordance with Industrial Security Manual, paragraph 6.b(9).* This

> report was prompted by our learning of Mr. Beattie's making contact with representatives from designated countries and failing to report that contact. The findings of any investigation resulting from this report could influence an access decision. We are not; however, privy to this information therefore are unable to make an informed determination is this case.

(emphasis supplied). Mr. Crisp included information gathered from their local investigation to assist the Air Force in its determination.

7. In consideration of the access issue, Captain Graham reviewed Boeing's security folder on plaintiff, a copy of a

personnel records check, a copy of a security violations check, and a copy of a report filed by Boeing with the Defense Investigative Services (DIS). He also spoke with Jim Barton, Nat Addleman, Kerry Crisp, and Carol Dickey in regards to the letter written by Mr. Crisp.

8. Two and one-half months later, Lt. Col. Darrell J. Johnson informed BMAC of the Air Force's decision in a letter dated July 27, 1989:

> Based on Mr. Beattie's past history, he is not authorized escorted or unescorted access to the VC-25A security area. Further, we are concerned that you didn't disqualify Mr. Beattie based on the report made to the Defense Investigative Service

(DIS). Unless the DIS investigation shows otherwise, Mr. Beattie clearly fails to meet paragraphs III.A and III.C of Annex 2 of the Statement of Work. In the future, it is necessary that BMA accomplish adjudication of employee screenings in accordance with the procedures set forth in Annex 2.

9. The DIS report referenced above was made by N.J. (Nat) Addleman, manager of information security at BMAC, and was dated March 24, 1989. Addleman reported:

> Individual has had contact with citizen from USSR. In April 1986, individual contacted (by phone) the Soviet Embassy in Washington, D.C. to express personal sympathy on the

death of the firefighters at Chernobyl. He was requested to convey this message in writing, which he did. No further contact has been received from the Embassy or sought by the individual. In March of 1987, individual spoke with a Dr. Simon Kechanayli at a conference in Chicago, IL. Individual apologized for a remark made by a local Senator and stated that not everyone from Kansas agreed with the Senator. No further contact has been made with or received from any representatives from designated countries.

Plaintiff does not dispute the accuracy of this report.

10. In response to this report, the

Defense Investigative Service (DIS), a separate agency under the Department of Defense, from March 1989 through June 1989, investigated Mr. Beattie's contacts with the Soviet Union and interviewed him, his associates, and his supervisors. The DIS, in its limited role, communicated the results of its investigation to the Directorate for Industrial Security Clearance Review (DISC), which is part of the Defense Legal Services Agency of the Department of Defense. The DISC adjudicates security clearances for those employed in private industry which have been referred to it by DIS. The DISC made a favorable determination concerning plaintiff after reviewing the DIS investigative file. It determined the

plaintiff's security clearance at the secret level was consistent with the national interest.

11. The Air Force issued its decision on July 27, 1989, denying plaintiff access to the Air Force One area apparently without knowing of or reviewing the DIS's investigation or the DISC's favorable determination.

12. The contract between BMAC and the Air Force provides in pertinent part:

> 2. The contractor must use only personnel who meet the qualifications prescribed in paragraph IIIB(1) for Presidential aircraft. Failure of an employee to meet these qualifications will be a matter between the employer and employee. Denial does not allow

the employee an appeal under the Industrial Personnel Access Authorization Program.

....

5. Only those persons who are determined to be best suited for such duties consistent with optimum Presidential security will be nominated, selected, assigned, employed, or retained in Presidential Support positions. Nominees must be the most suitably qualified individuals available for consideration and must:

....

b. Be of excellent character and stability with a high degree of maturity, discretion,

> trustworthiness, professional competence and unquestioned loyalty to the United States.
>
> ....
>
> f. Have no personal habits, characteristics, traits, activities or associations which would be the basis for reasonable doubt as to the individual's reliability, stability, or general suitability for Presidential Support duties.

Paragraph 6b(9) of the Industrial Security Manual requires BMAC to report to the DIS the travel or contact of BMAC employees in or with certain foreign countries.

13. In his affidavit, plaintiff avers that BMAC supervision was promptly told of his contacts with the Soviet

Embassy and his later conversation with a Soviet doctor at a conference in Chicago.

14. The Air Force's action denying plaintiff access to Air Force One did not affect plaintiff's job rating, hours of work, or his income. Plaintiff alleges he was denied promotions and harassed by coworkers because of the Air Force's decision. He also offers evidence that his reputation has suffered as a result. Plaintiff states he resigned from Boeing in June of 1990 due to the humiliation and lack of promotional opportunities caused by the denial of access.

This case presents a question of subject matter jurisdiction that has not been briefed nor argued by the parties. Parties cannot waive the issue of subject

matter jurisdiction, and the court must dismiss a case for the lack of jurisdiction even if the parties fail to bring it to the court's attention. *Williams v. Life Sav. and Loan,* 802 F.2d 1200, 1202 (10th Cir.1986). Plaintiff asserts the court has jurisdiction of his suit under 28 U.S.C. § 1331 and 5 U.S.C. § 702. The latter statute is concerned with judicial review of agency action and is expressly subject to other limitations on judicial review. The former statute creates federal question jurisdiction. In the pretrial order, plaintiff articulates the following constitutional claims: denial of plaintiff's right to procedural due process under the Fifth Amendment when he was denied his property interest in

employment and/or his liberty interest to pursue his chosen profession without a hearing, denial of his right to substantive due process under the Fifth Amendment when he was subject to arbitrary and capricious action, and denial of his right to freedom of speech and association under the First Amendment when the reasons for the adverse action were protected political activities. The jurisdictional issue is whether this court can review the defendant's decision denying plaintiff access to the Air Force One area.

The Supreme Court in *Department of the Navy v. Egan,* 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), held that the Merit Systems Protection Board lacked authority to review an executive decision

to revoke a security clearance. Circuit courts have construed *Egan* as logically precluding judicial review of these same executive decisions. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir.1990), *cert. denied*,—U.S.—, 111 S.Ct. 1104, —L.Ed.2d—(1991); *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203, 1205-06 (4th Cir.1990); *Hill v. Department of Air Force*, 844 F.2d 1407, 1409 (10th Cir.), *cert. denied*, 488 U.S. 825, 109 S.Ct. 73, 102 L.Ed.2d 49 (1988).

In *Dorfmont*, plaintiff, an employee with a government contractor, was denied a security clearance after a DISC investigation. 913 F.2d at 1400. The security clearance was a requirement for plaintiff's position. She appealed the

decision through the various levels of the Department of Defense and eventually turned to the federal courts. The Ninth Circuit held that the district court could not review the merits of the department's revocation of plaintiff's security clearance. 913 F.2d at 1401. In the Ninth Circuit's opinion, the case of *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), confirmed that federal courts are without jurisdiction to review the merits of security clearance decisions. 913 F.2d at 1401. The Supreme Court in *Webster* found that the discretion conferred to the Director of the Central Intelligence Agency by statute precluded judicial review of security clearance decisions.

486 U.S. at 601, 108 S.Ct. at 2052.

In *Jamil v. Secretary, Dept. of Defense*, the plaintiff conceded and the Fourth Circuit agreed that the substance of the Defense Mapping Agency's decision to revoke the security clearance of one of its employees was not judicially reviewable. 910 F.2d at 1206. The Tenth Circuit in *Hill* quoted extensively from *Egan* in support of its conclusion that judicial review was not available on the merits of the Air Force's decision to revoke the security clearance of the plaintiff, a civilian, whose employment depended upon the clearance. 844 F.2d at 1409-1410.

The circuit courts logically extended the reasoning in *Egan* to judicial review

because of the compelling statements made by the Supreme Court therein:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." (US Const, Art II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. (Citations omitted).

484 U.S. at 527, 108 S.Ct. at 824. The Court recognized a security clearance decision was a prediction of sorts made by those with the necessary skill, training, and experience:

> [I]t is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information....
>
> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reason ... too obvious to call for enlarged discussion," *CIA v. Sims*, 471 U.S. 159, 170, 85 L.Ed.2d 173, 105 S.Ct.

1881 [1888] (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The court accordingly has acknowledged that with respect to employees in

> sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." *Cole v. Young,* 351 U.S. 536, 546, 100 L.Ed. 1396, 76 S.Ct. 861 [868] (1956).

Egan, 484 U.S. at 528-529, 108 S.Ct. at 824-825. The decision whether to allow access to the Air Force One area is the same type and quality and requires the same predictive judgment as the decision whether to grant a security clearance. The only distinction appears to be one of

degree. An employee with secret security clearance is not necessarily allowed escorted or unescorted access to the Air Force One area. This court concludes it cannot judicially review the merits of the Air Force's decision to deny plaintiff access to this secured area. This court is in no position to second-guess that decision. No jurisdiction exists to entertain such a challenge. See *Williams v. Reilly*, 743 F. Supp. 168, 171 (S.D.N.Y.1990).

As previously set forth, plaintiff makes a number of constitutional attacks against the Air Force's adverse ruling. The courts are unsure whether review is available even when the plaintiff raises the challenges to a constitutional level.

The Tenth Circuit noted in *Hill* that "if the statutory constraints imposed in *Egan* can be bypassed simply by invoking alleged constitutional rights, it makes the authority of *Egan* hardly worth the effort." 844 F. 2d at 1411. See also *Williams v. Reilly*, 743 F.Supp at 171-72. But see *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 643 (10th Cir.1990). The Fourth Circuit avoided answering what it called a difficult question and, in rather summary fashion, considered and dismissed the constitutional claims. *Jamil*, 910 F.2d at 1209. The Ninth Circuit pointed out in *Dorfmont* that jurisdiction may exist over constitutional claims since the Supreme Court had held in *Webster* that courts

could entertain colorable constitutional claims unless Congress clearly intended in the statutes to do away with any judicial review. 913 F.2d at 1402.

The plaintiff has couched his constitutional challenges in such terms that reveal they are simply disguised attempts to have this court review the merits of the Air Force's decision. Plaintiff repeatedly characterizes his contacts with a Soviet doctor and the Soviet Embassy as "innocuous" and "innocent." Plaintiff insists the Air Force relied on erroneous and misleading information. Plaintiff is adamant that the Air Force's decision is unreasonable and without justification. How this case got here is another indication of

plaintiff's intent. When BMAC denied him access, plaintiff lodged a grievance. Plaintiff agreed to settle his dispute with the union and his employer by having the Air Force decide the issue of his access. Now convinced that the Air Force wrongly decided the issue, plaintiff wants this court's opinion on the matter. Though plaintiff's constitutional claims are thinly veiled requests for judicial review, the court will address them.

PROCEDURAL DUE PROCESS

The protection of procedural due process extends only to those established and recognized property or liberty interests. *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1394 (10th

Cir. 1988). "[T]he range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth,* 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

Though protected by the Constitution, property interests emerge from another source such as state statutes, local ordinances, established rules, or mutually explicit understandings. *Perry v. Sindermann,* 408 U.S. 593, 601-602 n. 7, 92 S.Ct. 2694, 2700 n. 7, 33 L.Ed.2d 570 (1972). A property interest is more than an "abstract need or desire" and more than a "unilateral expectation of it." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709.

The concept of liberty

encompasses two interests in a public employment setting: "1) the protection of his good name, reputation, honor, and integrity, and 2) his freedom to take advantage of other employment opportunities." *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988) (quoting *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir.1983)). Injury to reputation alone will not suffice to trigger due process requirements unless entangled with the loss of a more tangible interest such as employment. *Setliff*, 850 F.2d at 1396. "For an employee to make a successful liberty deprivation claim, in addition to proving one of the above-recognized interests, he must also show that his dismissal resulted in the

publication of information which was false *and* stigmatizing." *Conaway v. Smith*, 853 F.2d at 794 (emphasis in original) (citing *Sipes v. United States*, 744 F.2d 1418, 1421 (10th Cir.1984)).

Plaintiff has no constitutionally protected property or liberty interest in his access to the Air Force One area. See *Dorfmont*, 913 F.2d at 1402-04; *Jamil*, 910 F.2d at 1209; *Hill*, 844 F.2d at 1411-12. The Tenth Circuit in *Hill* looked primarily to the reasoning expressed in *Egan* to reject the claim of a property or liberty interest in a security clearance. 844 F.2d at 1407. The Supreme Court there made clear:

> It should be obvious that no one has a "right" to a security clearance.

The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with interests of the national security." (Citation omitted). A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but also may be based upon concerns

> completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic." *Molerio v. FBI*, 242 US App DC 137, 146, 749 F.2d 815, 824 (1984).

Egan, 484 U.S. at 528-29, 108 S.Ct. at 824-825. A security clearance is determined upon the "discretionary exercise of judgment by the Executive as to the suitability of the recipient for such access, consistent with the interests of national security." *Hill*, 844 F.2d at 1411. To find a property interest in access to national secrets or a secured

area, like the facilities housing Air Force One, would be inconsistent with the principles so clearly enunciated in *Egan*. Whatever expectation that plaintiff had in entering the Air Force One area was unilateral at best and, therefore, could not give rise to a property interest. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709.

Plaintiff mistakenly relies on *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959), to recognize a property or liberty interest in employment affected by denial of a security clearance. The Court expressly decided against addressing those issues in favor of deciding whether the plaintiff could be deprived of certain procedures in the absence of authorization by either the

President or Congress. *Id.* at 492, 508, 79 S.Ct. at 1411, 1419. *Greene* does not substantially advance the plaintiff's argument. *Dorfmont,* 913 F.2d at 1404.

For the same reasons that a property interest has been rejected, the circuit courts have not found a liberty interest implicated by the revocation of a security clearance. *Dorfmont,* 913 F.2d at 1403; *Hill,* 844 F. 2d at 1412. Plaintiff did not lose the right to his chosen profession when he lost the opportunity to perform his profession in a particular area or building. Having no protected interest in that access, plaintiff cannot have a liberty interest in the particular employment requiring such access. *Dorfmont,* 913 F.2d at 1403.

The Air Force did not publicly disseminate the information used in its decision. Restricted disclosure to the employer and contractor for its use in assigning workers to the secured area is not stigmatizing. See *Doe v. Cheney*, 885 F.2d 898, 910 (D.C.Cir.1989). Gossip and speculation by others does not satisfy the publication requirement. A liberty interest is not impinged unless the false and stigmatizing information is made public by the government entity itself. *Derstein v. State of Kan.*, 915 F.2d 1410, 1414 (10th Cir.1990), *cert. pending*.

"A clearance does not equate with passing judgment upon an individual's character." *Egan*, 484 U.S. at 528, 108 S. Ct. at 824. The Air Force informed BMAC

that it was denying plaintiff access because of his "past history," in particular, his Soviet contacts that were the subject of the DIS report. These are nonspecific reasons which fall within the Supreme Court's rationale in *Egan*. Because clearance may be denied for reasons ranging from past conduct to familial ties with a hostile country, the mere act of denying clearance does not imply "disloyalty or any other repugnant characteristic." 484 U.S. at 528-29, 108 S.Ct. at 824-825. Plaintiff cannot show the defendant deprived him of a liberty interest.

Plaintiff next claims the Air Force acted arbitrarily and capriciously in denying him access and thereby violated

his right to substantive due process under the Fifth Amendment. This claim clearly reveals plaintiff's desire to have the merits of the Air Force's decision reviewed. Assuming such a claim could be made, plaintiff must allege a liberty or property interest to trigger substantive due process guarantees. *Harris v. Blake,* 798 F.2d 419, 424 (10th Cir. 1986), *cert. denied,* 479 U.S. 1033, 107 S.Ct. 882, 93 L.Ed.2d 836 (1987). Unable to meet this burden, the plaintiff cannot prevail on his substantive due process claim.

Plaintiff's last constitutional attack is that his right to freedom of speech and association under the First Amendment was violated. Again, it is apparent this claim is a pretense for

obtaining judicial review on the substance of the Air Force's decision. In particular, the plaintiff argues:

> Plaintiff's activities were *clearly innocent* and hence protected by the First Amendment. There was no reason to consider them as evidence of questionable character or loyalty to the United States or of a suspicious nature
>
> ....
>
> Defendant's contention in its brief that the call to the Embassy and the visit in the hotel lobby raise legitimate concerns about Plaintiff's motives has no merit. It cannot withstand careful analysis. Assuming these contacts were the

basis for the denial of the Air Force One access they too would violate the First Amendment.

(Dk. 45; p. 56). Nonetheless, the court will take up the plaintiff's First Amendment claim.

Plaintiff couches his claim in two approaches. First, BMAC originally denied him access because of his political activities and the defendant knew BMAC's motivation and simply upheld it in also ruling against plaintiff's access. Second, the defendant was concerned over the content of plaintiff's messages to Soviet citizens which were clearly political in nature. Neither approach presents a colorable constitutional claim.

The evidence of record does not show

that the defendant in any way intended to ratify or affirm any action taken by BMAC as a result of plaintiff's political activities. None of the documents show or sustain an inference that the plaintiff's anti-nuclear protests or campaign activities in support of candidates from the Democratic party were a substantial or motivating factor in the Air Force's decision. See *Conaway v. Smith*, 853 F.2d at 795. The only reasonable reading of the letter of July 27th from Lt. Col. Johnson to BMAC is that plaintiff's "past history," as evidenced in BMAC's report to the DIS, was the reason for the access restriction. The fact some later statements in internal Air Force memoranda, dated after July 27th, make

obscure references to other possible considerations does not raise a genuine issue of material fact in this court's judgment.

The Supreme Court in *Egan* elevated the predictive judgments involved in security clearances to a level beyond direct judicial review. The Court recognized the executive agency must have broad discretion to determine who may have access to information and what constitutes a potential security risk. 484 U.S. at 529, 108 S.Ct. at 825. The content of plaintiff's conversations with Soviet citizens obviously must be a subject of inquiry in evaluating him as an appropriate candidate for access to the Air Force One area. This alone does not

elevate the plaintiff's speech to a protected status nor establish a violation of the First Amendment.

On both occasions, the content of plaintiff's conversations was seemingly innocuous and personal in nature. Assuming the speech addressed a matter of public concern, this court is not willing to compromise national security and substitute its decision for that of the Air Force on what is a security risk. To deny access on the basis of plaintiff's contacts with Soviet citizens is not so unreasonable or untenable as to justify a closer scrutiny, or judicial investigation of sorts, into the Air Force's reasoning. Plaintiff's employment continued at BMAC in the same position and only his

responsibilities were affected to a limited degree. Plaintiff's right to speak and associate with others remained intact. In light of all these circumstances, the balance strongly favors the defendant's exercise of broad discretion in deciding who should have access to an area secured for important national interests. The court is unable to find a colorable constitutional claim under the First Amendment.

IT IS THEREFORE ORDERED that the defendant's motion for summary judgment (Dk. 22) is granted.

Excerpts From the September 20, 1986 Newspaper Article Kept in Beattie's Security File by James Barton, Boeing's Security Administrator

The Wichita Eagle
Religion/Ethics, Page 9C
(*see* App. to 10th Cir. at 314-315)

By Tom Schaefer
Staff Writer

JOB, PEACE ETHICS CONFLICTS GROW

. . .

Robert Beattie Jr., a 30-year-old firefighter in Boeing Military Airplane Co.'s department of security and fire protection, said he became concerned about nuclear destruction last year while taking part in fire protection exercises with Boeing's cruise missile operation and after reading Jonathan Schell's "The Fate of the Earth."

"At the time, it was troubling my conscience," Beattie said about his work.

"I do think the policy of deterrence is the greatest mistake our government's ever made."

Because of his increased concern for peace, Beattie said, he formed in January the Firefighter-Emergency Medical Technician Alliance With Citizens Working Toward Prevention of Nuclear War [Firefighters for Social Responsibility]--a group of about two dozen firefighters who seek to educate the public about the threat of nuclear disasters. In addition, he is chairman of the Wichita Area Peace Alliance. Beattie says he hopes he has "struck a balance" between his peace work and his job responsibilities by avoiding any activities that might jeopardize his

security clearance.

"If I lose my clearance, I'm out of a job," said Beattie.

One such effort at balance is to be a benefit softball game at 5 p.m. today at Wichita State University's softball field, matching members of the Wichita Area Peace Alliance and the Wichita State University Peace and War Group against Air Force personnel connected with the Strategic Air Command at McConnell Air Force Base. Donations will be equally divided between the Peace Alliance and the Air Force Aid Society.

A spokesman for Boeing said employee's involvement in peace activities did not threaten their jobs.

"That's an individual decision," said

Allen Hobbs, a Boeing spokesman.

Hobbs said security clearances for Boeing workers were handled by the federal government and not by Boeing.

...

TIMELINE

YEAR	EVENT
1984	Beattie granted security clearance, begins at Boeing.
1986	Beattie becomes president of Firefighters for Social Responsibility, which some of Beattie's Boeing managers characterize as "anti nuclear" organization (although one fire dept. manager joins). Harassment of Beattie begins.
	May--Beattie makes call from Boeing to Soviet Embassy re Death of Chernobyl Firefighters.
	Sept.--Charity softball game. A portion is broadcast live by local NBC affiliate.
1987	Early March, Beattie introduced to Soviet Academician.
	Late March, Beattie begins work on AF-1 project at Boeing.
	Sept., Beattie meets Gov. Dukakis and starts "Firefighters for Dukakis for President."
1988	Oct., Local Democrat v. Republican flag football game. Beattie is captain of winning Democrats. Game is lead story of local nightly televison news.

TIMELINE-continued

YEAR	EVENT
1989	Rumors abound, source unknown.
	Feb., Boeing security administrator revokes Beattie's AF-1 clearance for his "off duty political activities." Intense harassment begins.
	Feb., Beattie files grievance.
	Mar., DIS begins investigation.
	Mar. 3, Grievance settled. Boeing agrees to submit matter to Air Force for decision. Boeing infers to Beattie that AF will interview him.
	Mar. 24, Beattie provides Boeing with his handwritten DIS report of Soviet contacts.
	May, Boeing asks Air Force to make AF-1 clearance decision. They say their request is based on their just having discovered that Beattie had made previously unreported Soviet contacts--no mention of union settlement.
	June, DIS closes investigation.
	July, Without ever interviewing Beattie, A.F. denies Beattie security clearance. DISCR grants Beattie security clearance.

CONCLUSION

For all the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

DATED March 1995.

Respectfully submitted,

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